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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 83-11

CARLOS L. JIMENA, Petitioner,

v.

BOARD OF REVIEW OF THE UTAH INDUSTRIAL
COMMISSION AND UTAH DEPARTMENT OF
EMPLOYMENT SECURITY, Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

CARLOS L. JIMENA
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FEDERAL LAWS INVOLVED

United States Code, Title 26, Sec. 3304(a) (9)(A):

"compensation shall not be denied or reduced to an individual solely because he files a claim in another state (or ***) or because he resides in another state (or ***) at the time he files a claim for unemployment compensation."

United States Code, Title 28, Sec. 1343(4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

STATE LAW INVOLVED

Utah Employment Security Act, Sec. 35-4-22, (m) (1) :

"An individual is deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount. (underscorings supplied)

I. REFUTATION OF RESPONDENTS FIRST REASON

IN URGING THIS HIGH COURT TO DENY THE WRIT:

Respondents misunderstood the practical

application of the doctrine in Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (cited on p. 6, Respondents' Brief in Opposition). This Court explained it in a subsequent case as follows:

"This Court in Mathews v. Eldridge,*** held that the Due Process Clause does not require an oral hearing prior to termination of Social Security disability insurance benefits. We then granted petitions for writs of certiorari filed by the Secretary both in this case and in Mattern, supra, vacated the judgments below, and remanded the cases for further consideration in light of Eldridge." (Califano v. Yamasaki, 442 U.S. 682 (1979) at 690-1) (underscoring supplied)

Inasmuch as due process does not require oral hearing in disability insurance benefits as well as unemployment compensation claims, this Court held that affidavits are sufficient. To quote Commissioner v. Shapiro, 424 U.S. 614, 633 (1976): (again citing Mathews v. Eldridge)

"The Government may defeat a claim by a taxpayer that its assessment has no basis in fact - therefore render applicable the Anti-Injunction Act - without resort to oral testimony and cross-examination. Affidavits are sufficient so long as they disclose basic facts from which it appears that the Government prevail. The Constitution does not invariably require more. Gerstain v. Pugh, 420 U.S. 103 (1975); Mathews v. Eldridge, 424 U.S. 319 (1976)"

Now applying the aforequoted doctrines of Eldridge, Yamasaki and Shapiro to this case, it was a big mistake for respondents to require petitioner to submit to an interstate telephonic hearing which is an oral hearing. This is not required by, and runs counter to Mathews v. Eldridge.

The record will show that petitioner submitted sworn statements containing all the facts necessary for the decision of the case (See R.0050-0052, verification appears at R.0043; quoted also in petitioner's brief before the Utah Supreme Court, Case No. 18901 at pp. 4-4B) as manifested in his motion filed before the Utah Board of Review (R.0044). The sworn statement was disregarded as shown by the fact that no reference was made to it by the decision of the Utah Board of Review. (p. A2-A8, Appendix to instant petition for certiorari)

In light of the above discussion, it will be unnecessary to go thru the three factors constituting the balancing test on due process

laid down by Mathews case. However, since respondents made an erroneous application of them to this case, petitioner will demonstrate to this Court those errors.

First. The first factor under the Mathews case is the private interest to be affected by the official action. This factor was restated in another case:

"The first step in the balancing process mandated by Eldridge is identification of the nature and weight of the private interest affected by the official action challenged." (Mackey v. Montrym, 443 U.S. 1, 11 (1979))

How petitioner was affected by the cutting of benefits is shown by the record as follows:

"The lack of customer response was complicated by a receipt of denial of benefits for unemployment compensation. Appellant faced, with the problem of expecting no income whatsoever even from his unemployment compensation decided to move to Portland." (R.0050-1, Sworn Statement)

"Appellant should not have moved yet out of Medford City, Oregon. But with the wrongful denial of his claim *** he was forced to move to Portland immediately incurring expenses of transportation. He used his car in pulling a trailer but *** it broke down *** spent about \$300.00 to put it back on the road but *** is beyond *** repair*** sold it as junk for \$50.00 and hired U-Haul truck for about \$140.00." (R.0054, Sworn Statement)

Second. The next factor to be considered is the risk of erroneous deprivation or loss of rights through the procedure used, as related to the probable value, if any, of additional or substitute procedural safeguards.

Interstate telephonic hearing as compared to the judicial proceedings in the U.S. District Court and to the bifurcated hearing to be conducted by the Hearing Referee of the Employment Division, State of Oregon (Barr v. U.S., 478 F. 2d 1152, 1156 (1973); petitioner's quotation on p. 16 of his petition for certiorari was taken from syllabus no.7 which is criticized by respondents in their brief in opposition on p. 8) is the least preferable because telephonic hearing entails a higher risk of erroneous deprivation or loss of rights. The error is higher because the hearing officer in Utah does not see the demeanor of the witnesses. In the case of the hearing in the U.S. District Court, the judge hears and sees the witnesses. In a bifurcated hearing as discussed (already tested and approved in Barr v. U.S.,*supra*) in the instant

petition for certiorari, pp. 16-17, the Referee likewise sees and hears the witness because he is bound to make findings of facts and conclusions of law. In Utah, hearing and seeing the witness are inseparable elements in determining the demeanor of a witness. (Crow v. Ind. Com. of Utah, 140 P.2d 321, 322(1943)

In discussing the second factor, the Mathews case recognized how critical is a witness credibility in the decision making process.

"a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process***"(Mathews v. Eldridge, *supra*, at 343-4)

"To be sure, credibility and veracity maybe a factor in the ultimate disability assessment in some cases." (Mathews v. Eldridge, *supra*, at 344)

It will now be seen that determining the credibility of a witness thru his demeanor is a part of the second factor of the balancing test. Thus the doctrine of Simmons v. District Unemployment Board, 292 A.2d 797, 800 (1972) holding that unless the demeanor of a witness is considered due process would be lacking is in harmony with Mathews case.

Third. The last factor to be considered is the government interest involved, including fiscal and administrative burdens that additional or substitute procedural requirements would impose on the government.

The last factor deals more on which procedure is more economical and burdensome. In a bifurcated hearing, the only expense is the tape which cost \$1.00 to \$3.50. No expense is needed for transcription unless the case goes on appeal which is needed anyway in any kind of proceedings. One tape which has a playing time of 90 minutes can accommodate the testimony of three witnesses depending upon the length of testimony. In a telephone hearing how much would be the phone bill for 90 minutes by long distance between Utah and Oregon? The result would be that instead of paying claimants benefits, respondents would be paying telephone bills.

Of the three alternative procedures, telephonic hearing, bifurcated hearing and judicial proceedings, the latter is the most costly. But if claimants want it, they may go to court.

Now let us discuss which of the alternative procedures is more burdensome. All that the referee in Utah does is to wait for the findings of facts and conclusions of law of the referee in Oregon. What respondents fear is lack of cross-examination of witnesses. (As already stated before, cross-examination and even oral hearing is not required in this case, see pp. 1-2 hereof. Petitioner is pursuing this line of argument to satisfy respondents.) This can be done in behalf of the referee and employer in Utah by the referee in Oregon. While the hearing is in progress in Oregon, the Utah referee or employer may tell the Oregon referee by phone what question to ask the witness by way of cross-examination. (Again the warning here is if those questions are long, it had better be included in the set of written instructions to be explained infra.)

What the Utah referee needs to send to the Oregon referee is a set of instructions similar to instructions to a jury including which instruction the Oregon referee has to make a cross-examination in behalf of the

employer. In this way the Oregon referee need not be familiar with the Utah law on unemployment compensation akin to jurors in a trial.

II. REFUTATION OF RESPONDENTS SECOND REASON TO DENY THE WRIT.

Petitioner's right to file unemployment compensation is primarily predicated on U.S.C. Title 26, Sec. 3304(a)(9)(A) quoted on page 1 hereof. Without the enactment of the latter law petitioner's right is already lost by virtue of his transfer of residence to Oregon from Utah. Hence, the Utah Employment Security Act operates secondarily to or to supplement that federal law concerning out of state residents. Petitioner's right exist and continuous to exist under federal law, not by virtue of the Utah Employment Security Act.

When petitioner filed his claim for unemployment compensation in Oregon Employment Division which is forwarded to Utah (or if petitioner files his case with the U.S. District Court in Oregon) he is in fact securing or recovering unemployment compensation under U.S.C. Title 26(a)(9)(A) providing for the

protection of a civil right as supplemented
by the applicable state law, in this case the Utah Employment Security Act. This type of action falls within the original jurisdiction of the U.S. District Court in accordance with U.S.C. Title 28, Sec. 1343(4), quoted on p. 1 hereof.

Where jurisdiction is lodged is defined by law. It cannot be taken away from the U.S. District Court by failure to file a case or removal action.

Had petitioner filed a case in the U.S. District Court during the pendency of this case in Utah, respondents will invoke the doctrine of exhaustion of administrative remedies as they already argued before the lower court. (See p.6, Respondents Brief, Utah Supreme Court)

CONCLUSION

WHEREFORE, petitioner reiterates his prayer in his petition for a writ of certiorari. Respectfully submitted.

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